

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

WEDNESDAY, THE 10TH JANUARY 2007 / 20TH PAUSHA 1928

CRL.A.No. 771 of 2006(C)

SC.447/2004 of ADDL. SESSIONS COURT(ADHOC)F.T-III,
PATHANAMTHITTA
CP.16/2004 of JUDL.MAGISTRATE OF FIRST CLASS COURT-I,
PATHANAMTHITTA
.....

APPELLANT:

ANIL,
C.NO.9188,
CENTRAL PRISON,
TRIVANDRUM-12.

BY ADV. ADV.LIJU V STEPHAN(STATE BRIEF)

RESPONDENTS:

STATE OF KERALA,
REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.THOMAS JOHN AMBOOKKAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 10/01/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

K. THANKAPPAN, J.

Crl.A.No.771 OF 2006-C

Dated this the 10th day of January, 2007.

JUDGMENT

The appellant, accused, in S.C.No.44704 on the file of the Additional District and Sessions Judge (Adhoc) Fast Track-III, Pathanamthitta, faced trial for the offence punishable under Section 8(1) read with Section 8(2) of the Abkari Act. The prosecution allegation against the appellant is that he was found in possession of 35 liters of arrack in a plastic can having the capacity of 35 liters and 10 liters of arrack in a plastic can having the capacity of 35 liters and one liter of arrack in a bottle having the capacity of 1.5 liters and also a glass tumbler for selling arrack at K.I.P Kanal Puramboke, Kalanjoor Muri, within the limits of Koodal Police Station , on 6.4.2003 at about 10.45 a.m. Prosecution examined Pws 1 to 3 and relied on Exts.P1 to P8. MOs 1 to 5 were also produced. Closing the prosecution evidence, the appellant was questioned under Section 313 of the Code of Criminal Procedure. The appellant denied the prosecution allegations and stated that he is innocent in the

case. However, relying on the evidence adduced by the prosecution, the trial court found the appellant guilty under Section 8(1) and convicted thereunder and sentenced to undergo R.I for three years and a fine of Rs. One lakh with default sentence of fine for a further period of S.I for three months under Section 8 (2) of the Abkari Act. Challenging the above conviction and sentence, the appeal is filed.

2. Since the appellant is not having any counsel of his own choice, a member of the State brief panel has been appointed to argue the case of the petitioner. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor. The learned counsel appearing for the appellant had two contentions before this Court. Firstly the learned counsel submits that the trial court went wrong in placing reliance on the evidence of the prosecution witnesses, who are only official witnesses, as there was no independent evidence to corroborate the evidence of official witnesses. Secondly, the counsel submits that PW3, the Sub Inspector of Police and other officials have violated the provisions of the Abkari Act and the provisions of Kerala

Excise Manuel while conducting search and seizure of the contraband article.

3. The prosecution tried to prove the case against the appellant through the evidence of Pws 1 to 3 of whom PW1 is an independent witness, cited to prove the seizure, sampling and other actions followed by PW3 while detecting the crime against the appellant. But, this witness turned hostile to the prosecution and even denied his signature in Ext.P2 scene mahazer as well as the samples and the residue PW3 is the S.I of Police, Koodal Police Station, who had stated that while he was on duty on 6.4.2003 at about 10.45 a.m he got reliable information that the appellant was selling arrack at the KIP Canal Purampoke, Kanjiramoodu, Kalanjoor Muri village and on getting the above information, PW3 along with PW2 and another police constable reached the spot and found the appellant having in possession of a glass and a bottle and on seeing the police officers, the appellant tried to escape from the scene. However, the Sub Inspector of Police stopped him and questioned him and thereafter found MOs 1 and 2 cans containing 35 liters and 10 liters of arrack

respectively at the place from where the appellant tried to escape. Further it is noted that MO3 bottle was in his hand which contained one liter of arrack. It is also found that MO4 glass was also in the possession of the appellant. This witness has further stated that on preparing Ext.P2 scene mahazar, MOs 1 to 4 were seized at the spot and samples were taken from the two cans as well as from the bottle. This witness has further stated that on taking two samples each from MOs 1 to 3, the samples were got sealed and labeled and signed by the witnesses as well as the appellant. This witness has further stated that after seizing MOs 1 to 4 from the appellant, the samples and the residue and MO4 were produced before the court on the very next day, namely on 7.4.2003. Further, this witness has stated that the samples were got analysed and received Ext.P8 chemical report, which would show that all the samples contained ethyl alcohol of different volumes. It is proved that the samples were that of illicit arrack. On the basis of Ext.P8 chemical report and after completing the investigation, a final charge has been filed before the court. PW2 is a Head Constable, who accompanied PW3 while detection of the the crime.

He had stated before the court that on 6.4.2003, himself, PW3 and another constable went to the KIP Canal Purampoke road and seen the appellant standing there holding MO4 glass and also Mos 1 to 3. Further this witness has stated that seeing PW3 and the other witness, the appellant tried to escape from the scene. However, he was stopped by Pw3 and questioned and found that the appellant was in possession of MOs 1 and 2 cans and MO3 bottle which contained 35 and 10 liters and one liter of arrack respectively. This witness had further stated that two samples were taken from each of the cans as well as MO3 bottle. Further, this witness had stated that on search of the body of the appellant, two ten rupee notes were also found in the pocket of the appellant and that rupee notes were also seized by PW3.

3. The question to be decided in this appeal in the light of the contentions taken by the learned counsel is that whether the trial court is justified in finding that the appellant is guilty under Section 8(1) read with Section 8(2) of the Abkari Act or not. The prosecution case is that on getting

reliable information on 6.4.2003, PW3 and other police constables including PW2 went to the spot and found the appellant keeping in possession of MOs 1 to 4. But the contention of the learned counsel that only the evidence of official witness is available. Though PW1 was examined as independent witness, he had turned hostile to the prosecution. PW1 had stated that he had not seen anything at the spot as spoken to by Pws 2 and 3. He had also denied his signature in Ext.P2, the sample and the contraband article seized. In this context, the 2nd contention of the learned counsel appearing for the appellant assumes importance. When Pw3 was cross examined by the counsel appearing for the appellant before the court below, he had stated that PW1 was there as an independent witness. Exts. P1 and P1(a) are the statements recorded by the police under Section 161 of the Code of Criminal Procedure. But, the contention of the learned counsel is that it is the duty of the Police Officer or the Excise Official to call and to get at least two independent witnesses while they make search and other actions under the provisions of the Abkari Act. To substantiate this contention, the learned counsel cited a

judgment of this Court reported in **Ramachandran Nair v. State** (1990 (1) KLT 44). In the above judgment, this Court held that “the words “persons called upon to attend and witness such search shall include at least two persons” indicate legislative insistence for strict compliance with the proviso. When the statute uses the expressions such as “at least”, it must be understood that the minimum number required for its performance when it falls to below the minimum number the officer who makes the search has a duty to explain the reason for not adhering to the minimum requirement. If such explanation is acceptable to court, the seizure or search may not get vitiated”. The duty cast on the officials is not only the actions taken under Section 36 but also all provisions of the Abkari Act.

4. In the case in hand, it is come out in evidence that when Pws 2 and 3 and other police officials went to the spot, the appellant was found in possession of the contraband articles and on preparing Ext.P2 scene mahazer, the same were recovered. In Ext.P2 it is clearly stated that PW1, an independent witness, was also there as Ext.P2 would show

the name and signature of PW1. But, when PW1 was examined he stated that he was not present at the spot at all and he even denied the signature in Ext.P2, the sample and the contraband article seized by PW3. In the cross examination, this witness had stated that he was not in the scene at all during the relevant time. In this context, PW3 was cross examined by the defence and put specific questions regarding getting any other witnesses to watch the seizure and taking the samples. No explanation was offered by PW3 whether he called at least two independent witnesses to watch his performance. It is pertinent to note that, he had admitted the fact that there were inhabited houses and none of the people was called to watch the action taken by PW3. Very interestingly this Court is noting another fact that when PW2 was examined before the court, he had no case that PW1 was present at the time of the detection of the crime. Further it could be seen from Ext. P2 that, it is recorded in it that, the samples and the contraband article were sealed and labeled and signatures were obtained from the accused, PW3 and other witnesses. It is not stated that whether PW1 had signed any of the samples

labeled and sealed. Further, when PW3 was cross examined, a specific question was put to him whether any independent witness has been called to watch his action. He had given the answer that:

Either PW2 or PW3 had no case that any independent witness has been called to watch the action done by PW3. The contention of the learned counsel that PW3 has violated the mandatory provision of Section 36 has to be considered seriously and the non compliance of the above provision is vital to the prosecution. As per the dictum laid down by this Court in **Ramachandran's** case it is the duty of the officer to explain why he could not get the presence of at least two independent witnesses. This Court has already found that either PW2 or PW3 had not offered any explanation why PW3 had not tried to get the presence of independent witness to watch his performance. In this context, the dictum laid down by the Apex Court in the judgment reported in **M/s. Madan & Company v. Wazir**

Jaivir Chand (AIR 1989 SC 630) in which the Apex Court relying on the often quoted judgment of the Chancery Division in **Tayler v. Tayler** (1875 (1) Ch D 426) held that where power is given to do a certain thing in a certain way, thing must be done in that way or not at all that other methods of performance are “necessarily forbidden”. Though the prosecution tried to prove that the appellant was in possession of MOs 1 to 4 and found that he was in possession of the contraband article seized by the police, it is the duty of the prosecution to prove the seizure of the contraband article and taking of the sample and other actions followed by PW3 were in accordance with the provisions of the Abkari Act. Hence, this Court is of the view that if the mandatory provision was not complied with, it will vitiate the proceedings followed by PW3. Another question may come whether non-compliance of Section 36 cause any prejudice to the appellant. In this context, the learned Public Prosecutor placed reliance on the judgment of this Court reported in **Job v. State of Kerala** (1991 (1) KLT 491). In the above judgment, a learned Single Judge of this Court had considered the decisions in **Ramachandran's Case** (cited

supra) and held that the dictum laid down in the above judgment is not applicable to search of a person, but it is applicable to search of a place. But in **Ramachandran's case**, this Court had categorically held that the provision of Section 99 or 102 of the Cr.P.C is different from that of provision of Section 34 of the Abkari Act and this Court had held that the legislative insistence for contradict compliance with the proviso has to be considered while considering Section 34 of the Act. The facts now proved in this case would show that Pws2 and 3 had no case that two independent witnesses were called or they were present for watching the performance of PW3 and that apart this Court had already found that PW2 has not stated even the presence of PW1. In the light of the evidence of PW1 that he was not present at the scene and he denied his signature in Ext.P2, the case suggested to Pws 2 and 3 are also be considered in this background. It is specifically suggested to PWs 2 and 3 that the case was foisted against the appellant and all the materials produced were substituted as if were seized from the appellant. Though those suggestions were denied by Pws 2 and 3 in the light of the fact that the

appellant was charge sheeted and faced trial for some allegations and he was found guilty for the same offence in a prior case, the possibility of substitution of the contraband cannot be ruled out. Hence, non-compliance of Section 36 is prejudicial to the appellant.

Hence, this Court is of the view that the judgment of the trial court has to be set aside. Accordingly, the conviction and sentence ordered against the appellant are set aside and the appeal is allowed. The appellant is acquitted. The appellant, accused, in S.C.No.447/2004 on the file of the Additional District and Sessions Judge (Adhoc) Fast Track Court-III, Pathanamthitta, shall be released forthwith, if he is not required to be kept in jail in connection with any other case.

K. THANKAPPAN, JUDGE.

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K. THANKAPPAN, J.

CRL.A.NO. 771 OF 2006

JUDGMENT

10th January, 2007.

